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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 865

ATHANASIOS PATSIS a/k/a THOMAS NICKAS,
Petitioner,

vs.

IMMIGRATION & NATURALIZATION SERVICE.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MEMORANDUM FOR THE PETITIONER IN REPLY

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MEMORANDUM FOR THE PETITIONER IN REPLY

ARGUMENT

The Court's attention is respectfully invited to the following facts which show that the petition was not filed out of time. These facts are contained in a letter from Robert C. Tucker, Clerk of the United States Court of Appeals for the Eighth Circuit, dated March 15, 1965 and received by counsel for petitioner on March 16, 1965. (That letter is printed as Exhibit No. 1 and is set forth in full in the Appendix attached to this memorandum. The original

of that letter is being sent to the Court under separate cover.)

That letter reveals that the decree in this cause was not prepared until about November 9, 1964. Although decree was then *entered as of* October 29, 1964, it is apparent that the decree could not have been actually physically entered on October 29, 1964. When the decree was prepared on about November 9, 1964, the date of October 29, 1964, had passed. The decree was simply antedated for the date of October 29, 1964.

An examination of the Rules of the United States Court of Appeals for the Eighth Circuit, effective as of March 1, 1959, does not reveal the existence of authority to antedate a decree. Rule 14 (b) of the Eighth Circuit provides:

> "When an opinion has been filed with the clerk, he shall, unless otherwise directed by the court or by the judge who prepared the opinion, enter the judgment or decree required by the opinion, without submitting the form of judgment or decree to the court or to a member thereof for approval, and such judgment or decree, when so entered in conformity with the opinion, shall be the judgment and decree of the court."

Rule 14 (b) does not authorize the Clerk of the Eighth Circuit to antedate the judgment or decree for the date of the filing of the opinion.

As the Clerk's letter of March 15, 1965, points out, the Clerk of the Eighth Circuit and counsel for the government were, as late as November 6, 1964, controverting the issue as to whether the government had to prepare the decree in this case in conformity with Rule 27 (1) of the Eighth Circuit. On either November 7th or 9th, 1964, counsel for petitioner received a copy of the letter from the government to the Clerk of the Eighth Circuit in which

the government argued that Rule 27 (1) was not applicable. (That copy of the November 6, 1964, letter is printed as Exhibit No. 2 and is set forth in full in the Appendix attached to this memorandum. The original copy of that letter is being sent to the Court under separate cover.)

There is no doubt that an opinion and a decree are distinguishable. This Court held in *C.I.R. v. Bedford's Estate*, 325 U.S. 283, 285 (1945), that the commencement date, for computing the time within which a writ of certiorari should be filed, should begin from the date of judgment or decree and not from entry date of the opinion, even though the opinion contained words of enforcement similar to the language of a judgment or decree. In case of *The Providence Rubber Co. v. Charles Goodyear*, 6 Wall. 153, 18 L. Ed. 762 (1868), it was held that where a decree stated it was *entered as of* November 28, 1866, but was not actually entered until December 5, 1866, the date of December 5th would be used for computation of the applicable time limit for an appeal.

Petitioner contends that the entry date of the decree in this case should be November 9, 1964. It was on this date when the decree, after being prepared, was actually entered. As stated above, no authority exists for antedating the entry date of the decree.

Petitioner contends he should not be penalized for error existing in the minds of his counsel caused by an apparent confusion as to actual entry date of the decree. In this regard it must be pointed out that the Eighth Circuit granted petitioner a stay of mandate in this case until February 1, 1965. If October 29, 1964, is interpreted to be the entry date of the decree in this case, it must be noted that the mandate was therefore stayed for 95 days. (That order is printed as Exhibit No. 3 and is set forth in full in

the Appendix attached to this memorandum. The original copy is being sent to the Court under separate cover.)

This Court in *Costello* v. *Immigration & Naturalization Service*, 376 U.S. 120, 128 (1964), has characterized deportation "as a drastic measure and at times the equivalent of banishment or exile". Petitioner in this cause is faced with such drastic measures. In these circumstances, it is submitted that this cause should be decided on its merits, especially where respondent has only opposed certiorari for the reason that the petition was filed out of time. The government apparently does not oppose petitioner's writ on any other ground.

CONCLUSION

For the reasons submitted, petitioner respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

ALBERT J. YONKE,
HARRY D. PENER,
Counsel for Petitioner.

EXHIBIT No. 1

Letter from Clerk of the Eighth Circuit Court
Dated March 15, 1965

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

St. Louis, Mo. 63101

Robert C. Tucker, Clerk

March 15, 1965

Mr. Albert J. Yonke
Yonke and Shackelford
1422 Professional Building
1103 Grand Avenue
Kansas City, Missouri

Re: No. 17316. Athanasios Patsis, etc. v. Immigration and Naturalization Service.

Dear Sir:

With reference to the above styled cause in this Court, Mr. Pener of your office called me last week. The Court was sitting here in St. Louis at the time I took Mr. Pener's call and I am afraid that due to the pressure of the session, I was unable to give the matter about which Mr. Pener inquired my complete attention and may have, in fact, misadvised him.

The facts about which Mr. Pener made inquiry are as follows: The Court's printed opinion was filed October 29, 1964, and all counsel were notified of the filing of the opinion on that date. In our letter to counsel for the government advising of the filing of the opinion, we requested counsel to prepare the decree in this case in accordance with our Rule 27(1). In a letter dated November 6, 1964, counsel for the government took the position that the filing of a decree under our Rule 27(1) was inappropriate. We

thereupon prepared a decree in this office in conformity with the Court's opinion of October 29. That decree is dated and filed as of October 29 in accordance with our usual practice although I am certain that it was actually physically prepared on a date later than that, probably about November 9, 1964.

On November 13, 1964, we received a motion to stay the mandate in this case from you and a request for transcript of the proceedings in this Court for use in the Supreme Court of the United States in connection with an application for writ of certiorari. On that date we sent you a letter stating that an order had been entered staying the mandate of this Court and enclosed a copy of the Court's decree in this case bearing the date of October 29, 1964.

Very truly yours,

/s/ Robert C. Tucker
Robert C. Tucker
Clerk

RCT:lp
CC Mr. Don C. Bennett
Mr. Herbert J. Miller

EXHIBIT No. 2

Letter from Herbert J. Miller, Jr., Criminal Division, Department of Justice, Dated November 6, 1964

HJM:DRB:ns
39-43-25

November 6, 1964

AIR MAIL

Mr. Robert C. Tucker
Clerk
United States Court of Appeals
For the Eighth Circuit
St. Louis, Missouri

Re: Athanasios Patsis v. Immigration and Naturalization Service
C. A. No. 17316

Dear Mr Tucker:

This will acknowledge receipt of your letter dated October 29, 1964, enclosing a copy of the opinion filed in subject case.

Your letter indicates that the Government should, in accordance with Rule 27(1) of the Eighth Circuit, prepare a decree for the Court asking for enforcement of the administrative order involved in the instant case. We note, however, that the decree called for by Rule 27(1) is applicable to the type of action for judicial review outlined in Rule 27(c)—namely, where the Government has filed "[a]n application for enforcement of an order of an administrative agency, board, commission or officer . . ."

The instant action was precipitated not by the Government but rather by Patsis who, in accordance with Section 106 of the Immigration and Nationality Act of 1952 (8

U.S.C. Supp. V (1959-1963) 1105a), filed "a petition for review" of a final order of deportation made against him, 8 U.S.C. 1105a(a)(1). The Immigration and Naturalization Service, not Patsis, was the respondent in subject case, 8 U.S.C. 1105a(a)(3). In this respect see your Rule 27(1), wherein it is provided that the "agency, board, commission or officer concerned shall within ten days serve upon the respondent" a copy of the proposed decree. Since the Service is the respondent in this case, we do not believe that the filing of the type of decree contemplated by Rule 27(1) would be appropriate.

cc: Mr. Albert J. Yonke

Subject case is, to our knowledge, the first one decided by the Eighth Circuit under 8 U.S.C. 1105a. There have, however, been numerous such cases decided in several of the other Circuits, and judging from the opinion in those cases it appears to be the practice to enter an order dismissing the petition for review or an order sustaining the administrative final order of deportation. See, e. g., *Holz* v. *Immigration and Naturalization Service*, 309 F.2d 452, 454 (C.A. 9); *Talavera* v. *Pederson*, 334 F.2d 52, 58 (C.A. 6); *D'andrea* v. *Immigration and Naturalization Service*, 335 F.2d 377, 378 (C.A. 6); *Samala* v. *Immigration and Naturalization Service*, 336 F.2d 7, 13 (C.A. 5).

Sincerely,

HERBERT J. MILLER, JR.
Assistant Attorney General
Criminal Division

By:
HAROLD P. SHAPIRO, Chief
Administrative Regulations Section

EXHIBIT No. 3

Order of the United States Court of Appeals for the Eighth Circuit Dated January 5. 1965

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 17316 September Term, 1964

Athanasios Patsis a/k/a Thomas Nickas,
Petitioner,
vs.
Immigration & Naturalization Service.

On Petition for Review of Order of Board of Immigration Appeals

On motion of counsel for petitioner, it is now here ordered that the stay of a certified copy of the decree of this Court previously entered in this cause be, and is hereby, extended to and including February 1, 1965.

If within this period of time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, the stay hereby granted shall continue until the final disposition of this case by the Supreme Court.

January 5, 1965.